No. 21,825

United States
COURT OF APPEALS
for the Ninth Circuit

BERNARD HIATT,

Appellant,

v.

EMIL A. SCHLECHT, E. B. WEBER, NORMAN L. BUCKNER, ROBERT J. CALEY, CARL M. HALVORSON, ERIC HOFFMAN, J. M. STEINMULLER, JR. and RALPH PIERSON, as Trustees for the Oregon-Washington Carpenters-Employers Health and Welfare Trust Fund and as Trustees for the Oregon-Washington Carpenters-Employers Pension Trust Fund,

Appellees.

APPELLEES' BRIEF

Appeal from the United States District Court for the District of Oregon

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SUBJECT INDEX

SUBJECT INDEX (Cont.)

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (Cont.)

STATUTES

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JURISDICTION

Appellee agrees with and accepts Appellant's statement of jurisdiction.

STATEMENT OF THE CASE

Appellees agree with and accept Appellant's statestatement of the case.

STATEMENT OF FACTS

Appellees cannot agree with or accept Appellant's statement of facts. The trial court in its opinion and order succinctly set forth facts (p. 1, l. 30 thru p. 5, l. 16)[1] which are hereby adopted by Appellee, (C.R. 122-26).[2]

QUESTIONS PRESENTED

I

Does the United States District Court have jurisdiction of this suit under Sec. 301(a) of the Labor-Management Relations Act as amended (29 U.S.C. 185(a)), because it involves and has an affect on interstate commerce?

II

Is there a valid and enforceable agreement obligating Appellant to comply with the provisions of the Oregon-Washington Carpenters-Employers Pension Trust Fund and Health & Welfare Fund.

SUMMARY OF ARGUMENTS

I

Because it pertains to a matter involving and having an affect on commerce under Sec. 301(a)

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[1] The Pension Trust Fund Agreement referred to at p. 3, lines 12-13 is found as Plf's. Ex. 1. The Health and Welfare Trust Fund Agreement referred to at p. 3, line 13 is found as Plf's. Ex. 2. The Carpenters Labor Agreement referred to at p. 3, line 10 is found as Plf's. Ex. 3. The Building Trades Agreement referred to at p. 3, line 23 is found as Plf's. Ex. 6.

[2] (C.R. refers to Clerk's Record)
(R.T. refers to Reporter's Transcript)

of the Labor-Management Relations Act as amended (29 U.S.C. 185(a)) the United States District Court had jurisdiction of this case.

II

The Appellant is contractually bound by and obligated to comply with the terms and provisions of the Oregon-Washington Carpenters-Employers Pension Trust Fund and Health and Welfare Trust Fund.

A. Federal substantive law is paramount and governs the rights and duties of parties in suits arising under Sec. 301(a) of the Labor-Management Relations Act as amended (29 U.S.C. 185(a)).

B. The Pension Trust Fund and Health and Welfare Trust Fund Agreements were sufficiently connected to and incorporated in the Building Trades Agreement executed by Appellant to bind him to the terms thereof.

C. The fact the trustees of the Pension and Health and Welfare Trust Funds are not signatories to the Building Trades Agreement does not render Appellant's obligation to the fund unenforceable or void.

D. There was sufficient meeting of the minds between the parties here involved to find a valid and enforceable contract.

ARGUMENT I

The Federal District Court Has Jurisdiction Over This Matter Because It Involves and Has an Affect on Interstate Commerce

(1) Applicable statutory provisions

Congress, in Sec. 301(a) of the Labor-Management Relations Act as amended (29 U.S.C. 185(a)), has granted jurisdiction to the Federal District Courts over "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, . . . without respect to the amount in controversy . . ." The term "industry affecting commerce" is defined by Sec. 501 of the Labor-Management Relations Act as amended, (29 U.S.C. 142(1)), as ". . . any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce. . . ."

(2) The situation of the present case

The appellant purchased approximately $300,000 of materials and supplies between 1963 and 1965 for use in his construction business (C.R. 123). These were used in the construction of from seven to ten buildings annually with a price range of $10,000 to $15,000 each (Appellant's Brief, p. 14). The plumbing work for these buildings was accomplished by subcontractors under bids approximating $800 per house for labor and fixtures (R.T. 64). The plumbing

fixtures were manufactured outside of Oregon (C.R. 123). These figures indicate an annual total for these items of from $5,600 to $8,000 annually. In addition, electrical fixtures for these projects were procured from outside Oregon (C.R. 123).

(3) Appellant's construction business activity constitutes an "Industry Affecting Commerce."

The overriding standard in determining that an industry affects commerce is whether or not the particular labor dispute or activity complained of bears some substantial relation to the conduct of trade and commerce among the states or tends to burden and obstruct commerce and the free flow of commerce. But this does not mean that the parties involved must necessarily be directly engaged in interstate commerce. A party whose operation is wholly intrastate can still be found to indirectly affect interstate commerce. *Plumbers & Steamfitters, Local* 298 v. *Door County,* 359 U.S. 354 (1959); *NLRB* v. *Denver Bldg. & Constr. Trades Council,* 341 U.S. 675 (1951); *NLRB* v. *Fainblatt,* 306 U.S. 601 (1939).

The Denver Bldg. Trades case is particularly applicable to the facts of the instant matter. In that case a subcontractor purchased goods manufactured out of state and used them in completion of the project in question which had been subjected to union picketing. The Court found that the picketing activity might result in decreases in the importation of goods from outside the state and therefore an industry affecting commerce was involved. Also analogous is the

case of *Plumbers & Steamfitters Union, Local 598* v. *Dillon*, 255 F.2d 820 (9th Cir. 1958) where a contractor had rented a small shop in Washington State and contracted to lay 700 feet of pipeline into the Columbia River. The fabrication of the pipeline was accomplished in Washington State but the pipe itself was manufactured outside the State. This was held sufficient for the Court to find that refusal by the appropriate union to furnish workers for the project was an activity directed at an industry affecting commerce.

Likewise, in the instant matter, the dispute involving the terms and application of the Building Trades Agreement might, as found by the trial court (C.R. 124), well influence the influx of plumbing and electrical fixtures into the State of Oregon.

Within the above standard it is firmly established that the size of a particular business, *Plumbers and Steamfitters Union, Local No. 598* v. *Dillon*, 255 F.2d 820 (9th Cir. 1958), or the actual dollar value of commerce it conducts interstate, *NLRB* v. *Fainblatt*, 306 U.S. 601 (1939), is not alone determinative of whether the business affects commerce. Congress, under the statutes here involved and set out supra p. 4, has clearly and plainly set no restrictions upon Federal jurisdiction by reference to dollar amounts, *United Brotherhood of Carpenters and Joiners of America* v. *Sperry*, 170 F.2d 863 (10th Cir. 1945). The dollar value may certainly affect the amount of commerce involved to a greater or lesser extent, but if commerce is nevertheless involved, there is no con-

gressional restriction on control over the business, *NLRB* v. *Fainblatt*, 306 U.S. 601 (1939).

This analysis is, of course, subject to the so-called de minimis rule as to matters affecting commerce, *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951). But under currently adopted court standards this objection to the exercise of federal jurisdiction clearly does not apply in the instant case.

As set out supra p. 5, appellant's building activity involved the annual use of goods moving in interstate commerce valued at $5,600 to $8,000. This certainly is a substantial volume of interstate business, particularly in light of the fact appellant has carried on his business for at least five years prior to the two years in question in this case (R.T. 49).

The appellant has placed marked emphasis on several cases construing the de minimis doctrine. In *Local 384, Teamsters* v. *Patane*, 232 F. Supp. 740 (E.D. Pa. 1964) the business involved, unlike that of the present case, purchased none of its material or equipment in interstate commerce and sold all of its products locally. The court simply concluded that the de minimis rule was not even applicable because of a complete lack of interstate commerce affect. Secondly, the case of *Groneman* v. *IBEW, Local 354*, 177 F.2d 995 (10th Cir. 1949), involved the picketing of a construction job where approximately $6,000 of materials were purchased outside the state. The court applied the de minimis rule and refused jurisdiction of a damage suit resulting from the picketing. There

is, however, a clear distinction in that the *Groneman* case represents activity by a union aimed at a single construction project and single $6,000 purchase, while the instant case involves dispute over a collective bargaining agreement intended to run for several years (see Building Trades Agreement, Art. IX, Plt's. Ex. 6) and affecting the receipt and systematic purchase of goods manufactured outside Oregon in amounts upwards of $8,000 annually and approaching $16,000 during the two years here in question. Furthermore, Appellant's total purchases of supplies and materials approached $150,000 annually from 1963 to 1965 (C.R. 123) while in *Groneman*, the construction job involved total purchases of only $14,000. Finally, a local dairy purchasing goods from other states totalling about $100 per month or $1200 per year was held to fall within the de minimus rule in *Newell* v. *Chauffers, Teamsters & Helpers, Local* 795, 181 Kan. 898, 317 P.2d 817 (1957). This amount is, however, substantially below that expended by the Appellant's subcontractors for the plumbing and electrical work involved.

Beyond this principal theory of affecting interstate commerce it is also a well established principle that although a particular activity or labor dispute in isolation is essentially local and intrastate, if when multiplied into a general and broad practice it could reasonably exert an adverse effect on interstate commerce clearly calling for regulation and control then the local incident or industry may be regulated by federal action, *United Brotherhood of Carpenters and*

Joiners of America v. *Sperry*, 170 F.2d 863 (10th Cir. 1948). If the contract dispute here involving the Oregon - Washington Carpenters - Employers Health and Welfare and Penson Trust Funds were extended to all the construction operations in Washington and Oregon operating under that agreement (see Carpenters Labor Agreement, p. 68, Plt's. Ex. 3) the affect on the influx of goods from outside and between the states would greatly increase the already substantial impact resulting from the instant case.

The "jurisdictional yardstick" of $50,000 for non-retail businesses adopted by the NLRB is pointed out at page 13 of Appellant's Brief as bearing on the jurisdiction of the federal district courts in cases coming under Sec. 301(a) of the Labor-Management Relations Act of 1947, as amended, (29 U.S.C. 185(a)). However, such yardsticks are not determinative of the jurisdiction of the district courts. Only the NLRB, and not the district courts, have this discretionary power to decline jurisdiction where it seems advisable, *Local* 384, *Teamsters* v. *Patane*, 232 F. Supp. 740 (E.D. Pa. 1964). To the contrary, Congress has made it clear and the courts have emphasized, as set out supra p. 6, that the dollar volume of commerce conducted does not alone determine what constitutes an "industry affecting commerce" under the Labor-Management Relations Act.

Appellant's Brief beginning at page 14 asserts that the trial judge took little more than judicial notice of the fact that the plumbing and electrical fixtures for Appellants building projects were manufac-

tured outside of Oregon. However, the record of this case reflects that this was not the fact. As set out by the trial judge, a joint hearing was conducted concerning this case and four others involving employee benefit trust funds to determine the issue of jurisdiction (C.R. 123). At that time written briefs were filed and oral arguments heard from all the interested parties. It was held that the federal district court did in fact have jurisdiction. The subsequent raising of that issue by Appellant in this case and the trial court's decision in favor of jurisdiction were simply a reiteration of that issue, involving much more than mere judicial notice of facts.

(4) The pension and health and welfare trust funds represent employees affecting the flow of interstate commerce.

Although stated as dictum in the case, this court, in *Plumbers & Steamfitters Union, Local* 598 v. *Dillion*, 255 F.2d 820 (9th Cir. 1950), took a third direction and strongly intimated that regardless of an employer's direct or indirect involvement with interstate commerce, where a labor union involved sends workers across state lines and deals with employees in more than one state, the standard for an "industry affecting commerce" is met. In the present case, the Carpenters Labor Agreement covers Oregon-Washington Carpenters-Employers Health and Welfare and Pension Trust Funds represent Carpenters Union employees and non-union carpenters throughout all of Oregon and most of five Washington Counties. (see

Carpenters Labor Agreement, p. 68, Plt's. Ex. 3), therefore coming within the dictum of the *Dillion* case.

ARGUMENT II

The Validity and Enforceability of the Oregon-Washington Carpenters-Employers Health and Welfare and Pension Trust Fund Agreements.

(1) The appropriate law to be used.

The appropriate substantive law to be applied in suits brought under Sec. 301(a) of the Labor-Management Relations Act as amended (29 U.S.C. 185 (a)), is federal law fashioned by the federal courts to carry out the policies of national labor laws, *Local* 175, *Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962); *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957). Where that law conflicts or is inconsistent with established federal law, the authority of the federal law is paramount and prevails over the inconsistent state law, *Local* 174 *Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962); *Local* 24, *Teamsters* v. *Oliver*, 385 U.S. 283 (1959).

(2) The pension trust fund and health and welfare trust fund agreements are sufficiently connected to and incorporated in the building trades agreement executed by appellants to bind him to the terms thereof.

Appellant signed the Building Trades Agreement (Plt's. Ex. 6) on October 4, 1963, which contained

the following provisions:

"II

Except as herein provided the Employer, developer and/or Owner-Builder agrees to abide by all of the terms and conditions of the agreements of the respective craft employed, including wages, hours, working conditions, health and welfare benefits, pension benefit and other fringe benefits and hereby adopts such Trust or Fund agreement of each operative Union for such fringe benefits and agrees to the appointment of Employer, developer and/or Owner-Builder Trustees or their successors."

There is ample evidence that prior to signing the Building Trades Agreement Appellant was repeatedly made aware of the Carpenters Labor Agreement and the Oregon-Washington Carpenters-Employers Health and Welfare and Pension Trust Funds (R.T. 19, 30, 37, 42).

The trial judge found from the evidence that Appellant knew he would have to do more than simply hire union subcontractors to meet his obligations under the Building Trades Agreement (C.R. 126), and that the only possible pension and health and welfare funds that Article II of the Agreement could refer to were those brought to the awareness of the Appellant (C.R. 127).

The reference to the Health and Welfare and Pension Trust in the Building Trades Agreement coupled with the knowledge of Appellant and his awareness as to his obligations thereunder are sufficient

under the holding of *Calhoun* v. *Bernard*, 359 F.2d 400 (9th Cir. 1966) to incorporate the trust fund agreements into the Building Trades Agreement, binding the Appellant. As quite correctly pointed out by the trial judge's opinion (C.R. 127), there is no requirement under the *Calhoun* ruling that a document incorporated into a collective bargaining agreement be referred to specifically by name.

In *Calhoun*, reference was simply made to a pension plan to be negotiated between the parties and, as in the instant case, the employer was informed that he would be bound by a master labor agreement including the making of contributions to a pension plan.

The case of *Lewis* v. *Quality Coal Corp.*, 270 F.2d 140 (7th Cir. 1959) involving a separate but analobous situation lends further support to the present case. The collective bargaining agreement executed by Quality Coal required that all workers employed be union members to the extent and in the manner permitted by law. The court found this very general language sufficient to incorporate the provisions of Sec. 8(a)(3) of the National Labor Relations Act as amended (29 U.S.C. 158(a)(3)) in the contract in order to avoid an allegation of illegality in the contract as creating a closed shop agreement.

In any event, and regardless of the sufficiency of incorporation here involved, where an employer, as a party to a collective bargaining agreement, is not initially bound by its trust fund provisions due to

some defect in negotiations or its provisions, he is still obligated to immediately renounce or repudiate any liability to that trust fund despite the fact he has made no payments thereto at least by such time as it is sought to be enforced against him, and failure to do so will imply consent to its terms, *Lewis* v. *Lowry*, 322 F.2d 543 (4th Cir. 1963). The evidence in the instant case reflects that a Mr. Pio, as trust coordinator for the Oregon-Washington Carpenters-Employers Health and Welfare and Pension Trust Funds, introduced himself to Appellant on April 22, 1964, relating to him his position and the reason for his visit. In response to Mr. Pio's inquiries, regarding contributions to the trust fund Appellant merely stated that he had no employees at the time. In no way did he even imply or intimate that he was not bound by the health and welfare and pension fund arrangement as he now asserts (R.T. 46-47, 60-61 and Hiatt deposition p. 32).

(3) The fact the health and welfare and pension trust funds trustees are not signatories to the building trades agreement does not render appellant's obligation to the fund unenforceable or void.

Where a pension or Health and Welfare Plan is incorporated or included within the terms of a collective bargaining agreement, the trust or trustees managing the plan need not actually sign the collective bargaining agreement. They are third party beneficiaries of the agreement and as such can enforce the terms of the plan, *Lewis* v. *Benedict Coal Corp.*,

361 U.S. 459 (1960); *Calhoun* v. *Bernard*, 333 F.2d 739 (9th Cir. 1964).

These federal court rulings are contrary to the holding of *Seafarers' Welfare Plan* v. *George E. Light Boat Storage Inc.*, CCH 53 Labor Cases 11, 364, 402 S.W.2d 231 (Texas Court of Civil Appeals, 1966) relied on by appellant (Appellant's Br. 18), where the Texas Business Corporation Act was applied to find a welfare trust plan unenforceable for failure of the trustees to have executed a writing also signed by the employer. Because of the predominance of federal law in this area, set out supra p. 11, the federal court decisions must prevail over this inconsistent local law.

Section 2 of Article IV of the Trust Agreement and Pension Plan (Pl. Ex. I) and Section 2 of Article IX of the Health and Welfare Trust Fund (Pl. Ex. 2) state that, "Any individual employer . . . who is performing work of the type coming under the terms of the Collective Bargaining Agreement and within the jurisdiction of Union, may become a party to this Trust Agreement by executing in writing and depositing with the Board of Trustees his or its acceptance of the terms of this Trust Agreement in a form acceptable to the Board."

Appellant contends he has done nothing to become a party to either of the Trust Agreements in a form acceptable to the Board of Trustees (see Appellant's Br. 20). On the contrary, it is quite clear Appellant has become obligated to the terms of the

Trust Agreement on a basis acceptable to its trustees. The Building Trades Agreement is an agreement employed specifically by unions and the trustees to bind employers to the terms of the respective local union contracts and the trust agreement according to the testimony of Jens Horstrup, executive secretary of the Lane-Coss-Curry-Douglas Counties Building Trades Council, (see Horstrup Dep. p. 15) and the findings of fact by the trial judge (C.R. 124-25). Appellant's contentions therefore, seem wholly without merit as to this point.

(4) There was sufficient meeting of the minds of the parties to find a valid contract and contractual obligation.

Several witnesses testified during the trial of this case that Appellant was, on various occasions, furnished copies of the Carpenters Labor Agreement making reference to the terms of the Trust Agreements and that they discussed with Appellant at several times the health, welfare, pension and other fringe benefits he would be obligated to provide (R.T. 17, 30, 37, 42). Appellant further testified that he was aware generally that health, welfare, pension and other fringe benefits are involved in collective bargaining agreements (Hiatt deposition p. 47). From this evidence the trial judge concluded that there was a meeting of the minds as to the contractual obligation of the Appellant to make payments to the trust funds (C.R. 126-127).

A trial court's findings of fact are presumed correct. Unless the record on appeal establishes that the

trial judge's decision was clearly erroneous and had no basis in fact, the findings of the trial court should stand, *Calhoun* v. *Bernard*, 33 F.2d 739 (9th Cir. 1964). The record in the instant case is replete with testimony and evidence supporting the trial judge's findings as to whether Appellant and Appellees reached a meeting of their minds regarding Appellant's contractual obligation. Those findings clearly should not be disturbed.

CONCLUSIONS

For the foregoing reasons, Appellees respectfully submit that the decision of the United States District Court should be affirmed.

Respectfully submitted,

BAILEY, SWINK AND HAAS
By PAUL T. BAILEY
Attorneys for Appellees

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PAUL T. BAILEY
Attorney for Appellees